

OCT 12 2010

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY ~~DAVID P. BRISQ, Clerk of Court~~ FEDERAL CUSTODY

United States District Court		District	SOUTHERN OF TEXAS
Name (under which you were convicted): DAVID RODRIGUEZ		Docket or Case No.: 4:2006CR00213	
Place of Confinement: SUPERVISE RELEASE		Prisoner No.:	
UNITED STATES OF AMERICA		Movant (include name under which you were convicted) v. DAVID RODRIGUEZ	

MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
U.S. DISTRICT COURT OF SOUTHERN DISTRICT OF TEXAS
515 RUSK AVE.
HOUSTON TX 77002
(b) Criminal docket or case number (if you know): 4:2006CR00213
2. (a) Date of the judgment of conviction (if you know):
11-07-2007
(b) Date of sentencing: 11-05-2007
3. Length of sentence: 37 months
4. Nature of crime (all counts):
SEVEN COUNT INDICTMENT FOR VARIOUS
FEDERAL FIREARM OFFENSES.
5. (a) What was your plea? (Check one)
(1) Not guilty ☐ (2) Guilty ☒ (3) Nolo contendere (no contest) ☐
(b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?
GUILTY TO COUNT ONE, COUNTS AND 12-16
DISMISSED PER PLEA-AGREEMENT
6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☐

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☒
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐
9. If you did appeal, answer the following:

- (a) Name of court: U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT
- (b) Docket or case number (if you know): 07-20852
- (c) Result: VACATED SENTENCE AND REMANDED TO SAME DISTRICT FOR
RESULTING BY A DIFFERENT JUDGE BUT AFFIRMED CONVICTION
- (d) Date of result (if you know): 02-02-2009
- (e) Citation to the case (if you know): 306 F. APP'X 133 (5th Cir 2009)
- (f) Grounds raised:
BY ATTORNEY GEORGE MURPHY JR'S BRIEF.
- OBSTRUCTION OF JUSTICE ENHANCEMENT
- DENYING MOTION TO WITHDRAW GUILTY PLEA.
BY MOVANT'S BRIEF
- BREACH OF PLEA-AGREEMENT BY GOVERNMENT
- MULTIPLE WEAPON ENHANCEMENT
- RULE 11 VARIANCE FROM PLEA-AGREEMENT PROCEDURES
- (g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☐ No ☒

If "Yes," answer the following:

- (1) Docket or case number (if you know):
- (2) Result:
- (3) Date of result (if you know):
- (4) Citation to the case (if you know):
- (5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court:
- (2) Docket or case number (if you know):
- (3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

N/A

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding:

(5) Grounds raised:

(6) Did you receive a hearing where evidence was given on your motion, petition, or application? Yes ☐ No ☐

(7) Result:

(8) Date of result (if you know):

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not:

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE:

RULE 11 VARIANCE FROM PLEA-AGREEMENT PROCEDURES

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

ON 11-14-2008, MOVANT FILED A PRO-SE SUPPLEMENTAL BRIEF ARGUING A RULE 11 VARIANCE FROM PLEA-AGREEMENT PROCEDURES AND ASKED THE COURT TO OVERTURN CONVICTION.

THE GOVERNMENT DID NOT RESPOND AND THE COURT DID NOT RULE ON THE ABOVE RULE 11 ARGUMENT.

(SEE ATTACHMENT "MEMORANDUM")

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO:

INEFFECTIVE LEGAL ASSISTANCE

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(SEE ATTACHMENT "MEMORANDUM")

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

The CUSTOMARY PROCEDURE for CHALLENGING EFFECTIVENESS OF COUNSEL UNDER 6TH AMEND IS A POST-CONVICTION 28 USC § 2255 MOTION.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE: PROSECUTORIAL MISCONDUCT

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

ATTORNEY GEORGE D. MURPHY JR. REFUSED TO ESTABLISH ANY FORM OF COMMUNICATION WITH INDIVANT DURING THE APPEAL PROCESS. FURTHERMORE, MOST OF THE PROSECUTORIAL MIS-

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

CONDUCT OCCURRED DURING THE APPEAL.

Result (attach a copy of the court's opinion or order, if available):

N/A

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR:

NONE

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) **Direct Appeal of Ground Four:**

N/A

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☐

(2) If you did not raise this issue in your direct appeal, explain why:

(c) **Post-Conviction Proceedings:**

N/A

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

13. Is there any ground in this motion that you have not previously presented in some federal court?

If so, which ground or grounds have not been presented, and state your reasons for not presenting them: **NO**

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: .

(b) At arraignment and plea: **ATTORNEY JAMES STAFFORD**

(c) At trial: **515 CAROLINE
HOUSTON TX 77002**

(d) At sentencing: **ATTORNEY JONATHAN M. COX
402 MAIN ST. 4TH FLR.,
HOUSTON TX 77002**

(e) On appeal:

ATTORNEY GEORGE D. MURPHY JR
808 TRAVIS STE. 24
HOUSTON TX 77002

(f) In any post-conviction proceeding:

NONE

(g) On appeal from any ruling against you in a post-conviction proceeding:

NONE

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

THE FIFTH CIRCUIT VACATED MOVANT'S SENTENCE AND REMANDED IT TO THE SAME DISTRICT COURT FOR RESENTENCING BY A DIFFERENT JUDGE. RELYING ON THE GOVERNMENT'S CONCESSION, THE FIFTH CIRCUIT VACATED MOVANT'S SENTENCE BUT AFFIRMED HIS CONVICTION BASED ON MOVANT'S ATTORNEY MURPHY DEFICIENT BRIEF.

AT RESENTENCING, MOVANT RECEIVED A HIGHER SENTENCE AND AS A RESULT MOVANT FILED AN APPEAL WITH THE SAME COURT. ON 04-20-2010, THE COURT'S JUDGMENT AND SENTENCE WAS AFFIRMED BY THE FIFTH CIRCUIT COURT OF APPEALS.

THEREFORE, THE NEW JUDGMENT AND SENTENCE WHICH IS ENTERED AFTER RESENTENCING AND APPEAL WOULD BEGIN A NEW YEAR-LONG STATUTE OF LIMITATIONS.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of —

- (1) the date on which the judgment of conviction became final;
- (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief: **TO OVERTURN CONVICTION WITH PREJUDICE, IN ALTERNATIVE, REVERSE CONVICTION AND ALLOW MOVANT TO PLEA ANEW. BASED ON THE LISTED GROUNDS, MOVANT'S CONVICTION IS INVALID**

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on
(month, date, year).

Executed (signed) on 10-12-2010 (date).


Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

2107 HEATH RIDGE LN
RICHMOND, TX. 77469